LANDLORD-TENANT RELATIONS: UNINHABITABILITY AS A DEFENSE TO EVICTION. Peters v. Kelly, 98 N.J. Super. 441, 237 A.2d 635 (App. Div. 1968)

At 72 Second St. in Newark stood a three-story, once-white tenement house, shingled, run-down, perhaps 50 years old. Garbage littered the street and yard. No windows were broken, but the front door was grimy with soot and dirt and a stench emanated from the basement. There were no locks on the doors, and no lights in the halls. In Mrs. Kelly's apartment there was no hot water, and temperatures in the winter were low. Cockroaches scuttled under the sink.

Each of these deficiencies constituted a violation of the Newark Housing Code,[1] but the violations did not excuse Mrs. Kelly from paying her rent. Mrs. Kelly defaulted and her landlord brought a summary action for eviction.[2]

The defense offered to the summary action was the equitable one of uninhabitability; but the court refused to permit evidence in support of this defense, and allowed the landlord to recover possession.

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1. Compare NEWARK, N.J., REV. ORDINANCES. Ch. 15:4-6, -7, -14, -15, -17, -24, 9-1 (1966) with N.J. Regulations For The Construction And Maintenance of Hotels And Multiple Dwellings, Duties of the owner: 1903.1 b (odors), -d (refuse outside), -.9 a (infestation), -.10 b 1 (lighting in hall), -.10 c 1 (heat at 68°), -.11 b (hot water).

2. N.J. Stat. Ann. Sec. 2A: 18-53 (b)

By statute in New Jersey, an appeal of a summary dispossess action may only be granted if the trial court lacks subject matter jurisdiction.[3] Thus on appeal, the tenant was required to claim that the lower court's refusal to entertain the equitable defense went to jurisdiction. The Appellate Court did not accept this contention, presumably relying on a line of cases which hold that a trial court has jurisdiction if there is evidence upon which it could find a statutory basis for tenant removal.[4] The judgment of the lower court was affirmed.

Since its inception the summary dispossess statute has been strictly construed by the courts in the interest of protecting the tenant.[5] They have found inadequate notice to be a defense, and have even allowed the rent to be paid after judgment for possession, but before the court has adjourned.[6] Chancery frequently found grounds to enjoin summary proceedings, one court stating that the very fact that the proceedings were summary may be sufficient reason for such

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3. N.J. Stat. Ann. Sec. 2A: 18-59.

4. Vineland Shopping Center v. DeMarco, 35 N.J. 459, 464, 173 A.2d 270, 273 (1961).

5. Cartaret Properties v. Variety Donuts, Inc., 49 N.J. 116, 123, 228 A.2d 674, 678 (1967).

6. Saveriano v. Saracco, 97 N.J. Super. 43, 234 A.2d 244 (App. Div. 1967).

intervention.[7] The Supreme Court of New Jersey in Vineland Shopping Center v. DeMarco took pains to explain that after equity and law were joined, the equity court's abhorrence of a forfeiture was not lost by the union and the County District Court must weigh the landlord's rights against the tenant's equitable defenses.[8]

In Vineland the tenant was dispossessed for failing to pay a sewerage charge as agreed in his five-year commercial lease. The tenant appealed on the basis that the sewerage charge was actually part of the rent. Since he had paid the charge upon notice of termination of the lease for breach of condition subsequent, the tenant claimed he had paid "rent" and the district court lost jurisdiction to hear the case.[9] The Supreme Court, per Weintraub, C.J., agreed that "rent" included a sewerage charge, or any other charge which could be considered as gross rent and reversed. The court reasoned that since forfeiture for nonpayment was designed to insure performance, when performance is had, relief should be granted. The court explained:

> Hence the county district court must accept any equitable issue offered to defeat an action within its jurisdiction or to avoid a separate defense to such action. The rules of court are plain; there no longer is a barrier to the

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7. Henwood v. Jarvis and Schafer, 27 N.J. Eq. 247, 254 (Ch. 1876).

8. Vineland, Supra note 4 at 469, 173 A.2d at 275-76.

9. N.J. Stat. Ann. Sec. 2A: 18-55

> rendition of the correct judgment. To hold otherwise would continue the procedural waste which the constitutional reform intended to end and indeed at a level of litigation wherein the litigants can least afford to bear it. [10]

If, then, an equitable defense must be heard, should the hazardous or uninhabitable condition of the premises be considered an equitable defense? Two arguments persuade us that this defense should be permitted: 1) The tenant's remedy is otherwise wholly inadequate; 2) The contract is otherwise unconscionable as against public policy.

The tenant of a run-down uninhabitable tenement in a city slum has an inadequate remedy at law. The only remedy he may pursue at law is that of constructive eviction. Constructive eviction occurs when a tenant abandons the rented premises in a reasonable time because they are unsafe, unfit, or unsuitable for occupancy in whole or in substantial part.[11] The tenant can not remain, he must abandon, and in a reasonable time.[12] Reasonable grounds have included failure to supply adequate heat[13] and unsanitary conditions.[14] Unable to

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10. Vineland, Supra note 4 at 462, 173 A.2d at 275, 76.

11. Duncan Development Co. v. Duncan Hardware, 34 N.J. Super. 293, 112 A.2d 274 (App. Div. 1955).

12. Weiss v. I. Zapinsky, Inc., 65 N.J. Super. 351, 167 A.2d 802 (App. Div. 1961).

13. Stevenson Stanoyevich Fund v. Steinachor, 125 N.J.L. 326, 15 A.2d 772 (Sup. Ct. 1940).

14. McCurdy v. Wyckoff, 73 N.J.L. 368, 63 Atl. 992 (Sup. Ct. 1906).

afford to move outside the slum, the slum dweller does not want to move from his apartment. The right to move is an empty one. Any place the tenant could find for the same rent will probably be in the same poor condition.[15] Therefore, if the tenant were to pursue his only legal remedy, he would be forced to move from place to place seeking aid in fighting an endless round of court battles by attempting to prove each tenement unfit and each period of abandonment a reasonable time.

Two direct remedies against the landlord are available in California and New York which are not available to the tenant in New Jersey. In California the tenant has the right to deduct from the rent costs of making needed repairs up to the amount of one month's rent.[16] In New York City he may withhold the rent and deposit it in court after his dwelling has been declared a nuisance and the nuisance has not been abated within a certain period of time. The New York law permits the court to use the deposited rent to pay contractors to make the needed repairs.[17]

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15. REPORT FOR ACTION, Governor's Select Commission on Civil Disorder, State of New Jersey, at 58 (1968).

16. CAL. CIV. CODE Sec. 1942. Reasonable notice must be given to the landlord who must then fail to take action. Similar legislation exists in six other states. North Dakota omitted the one month's rent restriction. See 2 POWELL, THE LAW OF REAL PROPERTY, Sec. 233 (2) (Recomp. ed. 1967).

17. N.Y. MULT. DWELLING LAW Art. 8, Sec. 302-a. See also PENNA. HEALTH & SAFETY CODE 35 Sec. 1700-1.

The court in Peters, the instant case, mentioned that the tenant could have used his administrative remedy.[18] By this the court meant that since the city of Newark has granted authority to the director of the department of health and welfare to control and supervise the habitability of multiple dwellings,[19] the tenant could have filed a complaint with the director notifying him of the code violations. If an inspector found that the building contained a condition dangerous to life or detrimental to the health and safety of the occupants, the director could declare the building a nuisance. Once a nuisance is declared, the owner is notified and is given 30 days to abate it. If he refuses, the city may step in and do it for him, placing a lien on the property.[20]

An administrative remedy may be exclusive or concurrent. In New Jersey it is concurrent unless the statute involved is primary and exclusive, or involves agency expertness. Except in such cases, the doctrine of exhaustion of administrative remedies cannot be invoked. The "exhaustion" rule is one of convenience and not an indispensable precondition.[21] Here, there is no indication in the

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18. 98 N.J. Super. at 444-445, 237 A.2d at 637.

19. NEWARK, N.J., REV. ORDINANCES, Ch. 2:10-1, 2b (2); Ch. 15:1-3a, pursuant to N.J. Stat. Ann. Sec. 40:48-2. 12(a)

20. NEWARK, N.J., REV. ORDINANCES Ch. 15:10-3.

21. Swede v. City of Clifton, 22 N.J. 303, 125 A.2d 865 (1956).

ordinance that the remedy is exclusive. Further, it would not be workable as an exclusive remedy, because in order for it to work as such, we must assume three things: 1) that the tenant knows of his remedy and believes it will work; 2) that once the tenant notifies the authorities they have an adequate staff to handle such complaints and to act upon them promptly; and 3) that the landlord will comply with the order and will not evict the tenant.

As the U. S. Riot Commission Report (the Kerner Report) points out, the ghetto resident is unaware of his rights and mistrusts and feels alienated from government officials.[22] The first assumption then, falls.

The Newark Model Cities application for federal aid admits that over one-third of the city's housing units are substandard or dilapidated.[23] In one section of the city this figure rises to 91%.[24] With such a vast number of code violations, any administrative agency would be hard put to keep up with the complaints. Code enforcement must fail when the number of personnel is insufficient and the diffi-

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22. O. KERNER et al., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, The New York Times edition, at 284-5 (1968).

23. REPORT FOR ACTION, Supra note 15, at 55.

24. Sternlieb, The Tenement Landlord, at Harv. L. Rev. 801, 804, 860 (1966).

culties in discovering recurring deficiencies are overwhelming.[25] The second assumption also falls.

The owners of slum properties point out that Newark's property tax discourages rehabilitation of properties. They fear that any improvements will raise their assessment.[26] Once a tenant complains, there is nothing to prevent the landlord from giving notice, providing he waits 90 days,[27] since rentals are on a month-to-month or week-to-week basis. The last assumption falls.

Turning to the second reason why the equitable defense should be permitted, the contract is unconscionable otherwise, and against the public policy of the State. In 1967 New Jersey repealed its Multiple Dwelling Act and provided for the enactment of a new code to be promulgated by the Commissioner of the Department of Community Affairs.[28] The purpose of the act was to assure decent,

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25. Enforcement of Municipal Housing Codes, 78 Harv. L. Rev. 801, 804, 860 (1965).

26. The Tenement Landlord, Supra note 24 at 214. The property tax on Newark property assessed at $20,000 is $1,536 (REPORT FOR ACTION, Supra note 15 at 58.)

27. N.J. Stat. Ann. Sec. 2A:170-92.1. A rebuttable presumption of reprisal is raised if a notice to quit is given within 90 days of a complaint of a housing code violation. Should the equitable defense of uninhabitability be permitted, this statute should be amended to include raising such a defense.

28. N.J. Stat. Ann. Sec. 55:13-1 et seq. The regulations were promulgated in July, 1968.

standard and safe units of dwelling space, and the act was to be liberally construed.[29]

The courts did liberally construe the former act to the point of voiding an exculpatory clause in a lease. In Kuzmiak v. Brookchester,[30] a tort action involving a landlord's negligence in failing to keep a stairway in a safe condition, the court found that the bargaining positions of the landlords and tenants in housing accommodations are so unequal that tenants are in no position to bargain. The court held that the exculpatory clause could not immunize the landlord from all liability since it was contrary to public policy. This decision was supplemented in Altomare v. Cesaro,[31] another tort action, where the court held that a landlord has a duty to keep "all parts" of a tenement house in repair irrespective of an express contractual obligation.

The jump from a tort action to a contract action was accomplished recently by the Washington, D. C., appellate court in Brown v. Southall

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29. N.J. Stat. Ann. Sec. 55:13A-2.

30. 33 N.J. Super. 575, 111 A.2d 425 (App. Div. 1955).

31. 70 N.J. Super. 54, 174 A.2d 754 (App. Div. 1961). Compare with Buckner v. Azulai, 251 Cal. App. 2d Supp. 1013, 59 Cal. Rptr. 806 (App. Dept. 1967) where the court held that a tenant's waiver of habitability would be strictly construed to include only that part of the apartment within the tenant's immediate control and would not include an infestation of vermin which came through the walls.

Realty Co.[32] In Brown the court held that a landlord who flouts public policy and leases a tenement apartment when he knows the apartment is not to be rented until violations are corrected cannot recover any rent from the tenant. Here, as in Peters, the rent was in arrears and the landlord brought an action for possession. The tenant contended on appeal that the lease was an illegal contract since the landlord had been notified by a housing inspector some months prior to the lease that because of housing violations rendering the apartment unsafe and unsanitary the use of the basement as a dwelling place was prohibited. By the time of the appeal, the question was moot since the tenant had moved. However the court recognized that if the landlord prevailed in the summary dispossess action, he would immediately bring an action for unpaid rent with the first action as proof for the second. The contract was found to be against public policy and void.

The problem of uninhabitable dwellings is so immense that a tenant needs more than one remedy. Certainly the legislature's decision to have the housing code completely rewritten is a step in the right direction and is in line with the recommendations of the Kerner Report.[33] But the tenant's distrust of public officials is a convincing argument for

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32. 237 A.2d 834 (D.C. Ct. App. 1968).

33. KERNER REPORT, supra. note 22 at 480.

a private remedy.[34] The tenant's prime contact with the courts is in the dispossess action: it is here he needs his remedy and should be able to use it. Equity as the court of conscience should provide it.

If it is accepted that the tenant should have the equitable remedy of uninhabitable condition, under what circumstances should it arise? First, the deficiencies must be serious -- more than a missing screen or light bulb. The deficiency must go to the essence of civilized habitability, such as inadequate heat or lack of plumbing. Second, the landlord must have received notice of the conditions either through the tenant or a housing inspector, and must have failed to correct them in a reasonable time. Third, the tenant must have clean hands and must be able to prove that he has not contributed to or caused the deficiencies. Fourth, the tenant must show his good faith by depositing the rent with the court.

Once the defense is proved, what remedy should be available? The tenant does not want to move, he wants the tenement habitable. The rent cannot be completely taken away from the landlord or he will throw up his hands, and walk away from the building as a poor investment.[35] The doctrine of partial eviction provides a compromise. Under

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34. See Sax and Hiestand, Slumlordism As A Tort, 65 Mich. L. Rev. 869 (1967).

35. KERNER REPORT, Supra note 22 at 472. In New York City 2500 buildings were abandoned by owners when they were told to repair them.

this doctrine the deficiencies which deprive the tenant of the full enjoyment of the premises would be considered a partial eviction[36] and their value would be deducted from the rent until they are remedied. The court would apportion the rent according to the severity of the harm in the interim period.[37] When the deficiencies are corrected, the landlord would make a motion to the court to have the rent restored.

The theory of partial eviction was worked out by a Massachusetts court in Charles E. Burt, Inc. v. Seven Grand Corp.[38] Here the landlord failed to furnish electric power, sufficient heat and elevator service. The court held that these services went to the essence of what the landlord was to provide and failure to provide them constituted a breach of quiet enjoyment. The court found the measure of damages was the difference between the value of what the tenant should have received and the fair value of what he in fact received.[39]

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36. Lalekos v. Manset, 47 A.2d 617 (D.C. Munic. Ct. App. 1946) Subtenant remaining in part of leased premises.

37. Schoshinski, Remedies Of The Indigent Tenant: Proposal For Change, 54 Geo. L. J. 519 at 527 (1966).

38. 340 Mass. 124, 163 N.E.2d 4 (1959). Compare Massachusetts with New York where a partial eviction suspends the entire rent: Broadway-Spring St. Corp. v. Jack Berens Export Corp., 12 Misc. 2d 460, 171 N.Y.S.2d 342 (N.Y. Mun. Ct. 1958). Failure to provide elevator service.

39. This measure of damages is comparable to that of a buyer who accepts non-conforming goods under the Uniform Commercial Code (2-714). N.J. Stat. Ann. Sec. 12A:2-714.

It is time, then, for the courts to place landlord and tenant in a more equal bargaining position by refusing to evict tenants where the premises are uninhabitable. The right to a decent place to live should not be subservient to the right to a fair return on an investment.